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IN THE CIRCUIT COURT FOR THE STATE OF OREGON
FOR THE COUNTY OF JOSEPHINE

TMB RACING, LLC,
Petitioner,
v.
OREGON RACING COMMISSION,
Respondent.

Case No. _____

PETITION TO COMPEL AGENCY TO ACT

CLAIM NOT SUBJECT TO MANDATORY ARBITRATION

FEE AUTHORITY: ORS 21.135(1), (2)
\$281.00

Petitioner alleges:

INTRODUCTION

1.

This is a proceeding pursuant to ORS 183.490 to compel Respondent the Oregon Racing Commission (the “ORC” or the “Commission”) to issue a decision regarding four license applications submitted by vendors chosen by Petitioner TMB Racing, LLC (“TMB”) to supply historical horse racing (“HHR”) terminals for the Flying Lark hospitality and entertainment center. Additionally, TMB seeks an order compelling the Commission to set a date certain that it will consider and decide TMB Racing’s application to offer HHR wagering at the Flying Lark.

2.

After years of planning, \$50 million invested, over 150 employees hired, and extensive discussions with the Commission and other interested entities, TMB Racing is poised to open the Flying Lark hospitality and entertainment center at the Grants Pass Downs (“GPD”) horse racing

1 complex. The Flying Lark intends to offer HHR wagering that will produce funds and collateral
2 spending necessary to support and revitalize the Oregon horse racing industry, as well as the
3 economies of southern and rural Oregon. One study projects that with HHR wagering the Flying
4 Lark would create over 2000 jobs and over \$10 billion in new spending over thirty years.

5 3.

6 The Oregon Legislature authorized HHR wagering in 2013 specifically to boost the
7 state's horse racing industry and support economic development in rural Oregon. The Flying
8 Lark, however, may not offer HHR wagering until the Commission grants "totalizator licenses"
9 to TMB's HHR terminal vendors and approves TMB's own application to conduct HHR
10 wagering (in that order).

11 4.

12 Two vendors' license applications have been pending for seven months, while two others
13 have been pending since early October 2021. But the Commission has not yet voted on any of
14 the applications (the "Totalizator Applications") despite the fact that the ORC staff member
15 responsible for reviewing them expressly recommended their approval. Additionally, the ORC
16 has yet to set a firm date by which it plans to resolve TMB's HHR application (the "HHR
17 Application").

18 5.

19 Although unclear, the ORC's refusal to hold a vote on the Totalizator Applications may
20 be a result of waiting for the Oregon Department of Justice ("DOJ") to advise it on a handful of
21 legal claims that some Oregon tribes have advanced about HHR wagering. But after waiting
22 eight weeks, the DOJ still has not provided a legal opinion, has repeatedly postponed the date it
23 aims to provide a legal opinion, and has not stated when it will issue a legal opinion.

24 6.

25 The ORC's continued delay on holding a vote on the Totalizator Applications is
26 unreasonable, and it is causing harm to both TMB Racing and the community. The ORC's delay

1 not only leaves TMB Racing in financial limbo, but also unfairly hurts hundreds of the Flying
2 Lark’s current and future employees, its suppliers, Josephine County, and thousands of people
3 supported by the Oregon horse racing industry – all who need the imminent availability of funds
4 and spending from HHR wagering at Grants Pass Downs.

5 **PARTIES**

6 7.

7 Petitioner TMB Racing is the owner and operator of the Grants Pass Downs racetrack
8 complex in Grants Pass, Josephine County, Oregon, where Petitioner has its principal business
9 office. Grants Pass Downs is the only commercial horse racing track in Oregon, for which TMB
10 Racing holds a valid race meet operator license issued by the ORC. The GPD racetrack complex
11 includes the track, spectator stands, horse and jockey facilities, office space, and the Flying Lark,
12 which will be a 35,000-square-foot hospitality and entertainment center celebrating horse racing
13 and horses generally. From the start, TMB Racing has planned to operate up to 225 pari-mutuel
14 HHR wagering terminals at the Flying Lark.

15 8.

16 The Oregon Racing Commission is the state agency responsible for regulating and
17 overseeing all aspects of animal racing and pari-mutuel wagering thereon in Oregon. The
18 Commission is comprised of five governing commissioners, appointed by the Governor and
19 approved by the Senate. Agency staff support the Commission in its day-to-day operations. The
20 Legislature has delegated to the Commission sole authority to approve applications to conduct
21 HHR wagering at licensed horse racing tracks in Oregon or to grant licenses to supply pari-
22 mutuel wagering management systems, known as “totalizators,” which are both legally and
23 practically necessary for any type of authorized pari-mutuel betting. Additionally, the
24 Commission is widely recognized as the national leader in the licensing and regulation of
25 Advance Deposit Wagering Companies, who place their wagering hubs in Oregon to fall under
26 the Commission’s oversight. As a result, the Commission oversees the regulation of more than

1 \$6.6 billion in annual gaming revenue from numerous public and private multinational
2 companies connected to horse racing.

3 **FACTUAL ALLEGATIONS**

4 **I. TMB Racing’s mission is to revitalize the Oregon horse racing industry.**

5 9.

6 TMB Racing was founded in 2018 with the purpose of supporting, revitalizing, and
7 participating in the Oregon horse racing industry, with a particular eye to furthering economic
8 development and flourishing in southern and rural Oregon.

9 10.

10 Horse racing and breeding have a long and distinguished history in Oregon. For much of
11 that history, the health of the industry has depended on funding provided by pari-mutuel
12 wagering on live races. Starting in the mid-1980s, however, horse racing attendance steadily
13 declined in Oregon, as did the total volume of live race wagering. By the mid-2000s this decline
14 had led to the closing of all but one commercial animal racing track in the state. Eager for
15 solutions, horse racing industry advocates proposed legislation in 2013 to authorize HHR
16 wagering at racing tracks. Indeed, funds from HHR wagering had successfully bolstered live
17 racing operations and purses in multiple other states. Proponents of the bill made clear that
18 Portland Meadows, then the only commercial racing track in the state, likely would not survive
19 without HHR.

20 **II. The Oregon Legislature authorized HHR wagering to support Oregon horse racing 21 and the jobs it creates.**

22 11.

23 In 2013, the Legislature recognized the crucial economic and cultural benefits of a
24 thriving equine industry in Oregon and implemented horse racing advocates’ HHR proposal.
25 That year, it enacted legislation permitting licensed race meet operators to offer “mutuel
26 wagering at the licensee’s race course on horse races previously held,” that is, HHR wagering.

1 See 2013 Oregon Laws Ch. 275 (HB 2613) (codified as ORS 462.155). In 2014, the Legislature
2 further specified what qualifies as pari-mutuel or “mutuel” wagering, for the purposes of both
3 live animal races and HHR. See 2014 Oregon Laws Ch. 44 (SB 1537) (codified in relevant part
4 as ORS 462.010(9)).

5 12.

6 An HHR wagering terminal is an electronic pari-mutuel wagering system that allows
7 players to bet on historical horse races. Many HHR machine cabinets look not unlike those used
8 for traditional slot machines. The HHR terminal’s wagering processes, however, differ
9 fundamentally in that they are pari-mutuel, meaning that players are betting against each other
10 rather than against the operator or “house.”

11 **III. From 2015 to 2019 the ORC oversaw Portland Meadows’ operation of 150 HHR**
12 **terminals without issue.**

13 13.

14 Pursuant to Oregon’s new HHR legislation, in 2015 Portland Meadows installed 150
15 HHR terminals at its racing track complex. Portland Meadows was already struggling
16 financially at the time and just a few years later, in 2019, its owners decided to shutter the track
17 for good. In the interim, however, the ORC oversaw HHR wagering on the premises without
18 issue. Throughout that time, upon information and belief, the DOJ did not take any action nor
19 make any adverse public statements regarding the legality of Portland Meadows’ HHR terminals.

20 **IV. HHR wagering is key to TMB Racing’s plan to develop Grants Pass Downs and the**
21 **Flying Lark into a year-round equine-focused entertainment destination.**

22 14.

23 In March 2019, the ORC awarded TMB a race meet operator license to conduct
24 commercial horse racing at Grants Pass Downs, located on the Josephine County Fairgrounds.
25 In August of that year TMB signed a 50-year lease with Josephine County for the same purpose.
26 From the outset, TMB made clear to the public, the press, local government, and the ORC that it

1 planned to open a new facility at GPD that would offer HHR wagering with the purpose of better
2 funding the horse racing industry throughout the state. At a series of local planning and zoning
3 meetings, for instance, TMB publicly shared its vision for the GPD complex.

4 15.

5 In November 2020, TMB Racing finalized and shared with the public its plans for the
6 Flying Lark entertainment and event center at GPD, which included an HHR wagering floor.
7 Completion of the Flying Lark would cap a \$50 million investment TMB is making in
8 developing GPD and the Josephine County Fairgrounds into a year-round regional entertainment
9 destination. TMB Racing is the largest lease holder at the Fairgrounds, and upon completion the
10 Flying Lark will constitute the largest Class A meeting space in Josephine County. It will also
11 offer a destination full-service family restaurant as well as offices for the horse industry and the
12 ORC itself, whose current regulatory mandate centers on horse racing and pari-mutuel wagering
13 thereon. The HHR wagering floor will represent only around 16% of the Flying Lark's total
14 square footage.

15 **V. In 2021, the Legislature reaffirmed the lawfulness of HHR wagering, while limiting**
16 **its scope in response to tribal concerns.**

17 16.

18 By the fall of 2020, TMB had begun attempts to engage tribal gaming representatives
19 regarding its plans for HHR at the Flying Lark and regarding its vision for collaboration with the
20 tribes on gaming initiatives. And in 2021, representatives of several tribes met with and toured
21 the Flying Lark (under construction) as well as the adjacent horse track.

22 17.

23 Throughout the spring and summer of 2021, TMB Racing continued to engage with the
24 ORC and reach out to tribal entities regarding HHR wagering, about which some tribes had
25 expressed concerns. During the same period, TMB Racing participated in multiple legislative
26 hearings on proposed Senate Bill 165, which specifically addressed the scope of HHR wagering

1 in Oregon. Several tribes actively participated in shaping the bill’s final content as well. In July
2 2021, the Legislature passed SB 165. The bill reaffirmed the lawfulness of HHR wagering,
3 while also strictly limiting HHR to the physical premises of licensed racing tracks and
4 prohibiting it on mobile devices, as the tribes had requested. *See* 2021 Oregon Laws Ch. 573
5 (SB 165) (effective January 1, 2022). The bill additionally established a new distribution scheme
6 for HHR wagering revenue, on the widely held premise that such revenue from HHR at the
7 Flying Lark was crucial to supporting horse racing in the state. *Id.*

8 **VI. HHR wagering at the Flying Lark is projected to bring billions of dollars in**
9 **additional spending to Josephine County and southern Oregon.**

10 18.

11 An economic study presented to the ORC established that, if operating 200 or more HHR
12 terminals, the Flying Lark would over thirty years add over \$10 billion in new spending on the
13 horse racing industry and the local economy, and it would create over 2000 new jobs. Without
14 the Flying Lark and its HHR funds, the same study projected a continuous decline of equine-
15 related spending in Oregon, which many experts are confident the industry would not survive.

16 **VII. TMB Racing and its vendors submit their HHR applications to the ORC.**

17 19.

18 TMB’s existing race meet operator license carries with it the right to conduct HHR
19 wagering on racing track premises—provided, that is, that TMB’s HHR plan meets several
20 statutory and regulatory criteria. One of those criteria is that the race meet operator must source
21 its HHR terminals from suppliers with valid ORC totalizator licenses.

22 20.

23 TMB Racing’s chosen HHR terminal vendors are Ainsworth Game Technology, Inc.;
24 Konami Gaming, Inc.; PariMAX Holdings LLC; and Castle Hill Gaming, through its local entity
25 HHR Oregon LLC. TMB plans to procure the largest portion of its HHR terminals from
26 Ainsworth. All four suppliers are established, experienced gaming technology companies whose

1 HHR systems are licensed in multiple other jurisdictions and are certified by Gaming
2 Laboratories International (“GLI”), itself the global gold standard in gaming testing and
3 certification. GLI has provided gaming- and lottery-related services in 480 jurisdictions
4 worldwide, including to over 250 tribal jurisdictions in North America.

5 21.

6 For established gaming technology suppliers, the ORC’s totalizator license requirements
7 are not onerous. The vendors must provide, for instance, the names and license numbers of
8 relevant personnel, an organizational structure chart, disclose whether the vendor has ever been
9 fined in another jurisdiction, and pay the applicable fee. *See* OAR 462-230-0010 (“Totalizator
10 Licensing Requirements”); ORC, Application for a Totalizator License, OREGON.GOV (last
11 accessed Dec. 16, 2021), *available at*
12 <https://www.oregon.gov/racing/ORC%20Forms/Totalizer%20Application.pdf>.

13 22.

14 During the spring and summer of 2021, TMB’s HHR vendors prepared their Totalizator
15 Applications. During the same period, TMB prepared its own HHR Application, which the ORC
16 cannot approve until after it grants the totalizator licenses. Once the HHR vendors are licensed,
17 the vendors must ship the HHR terminals to the Flying Lark, where the terminals must undergo
18 additional security and systems testing before the ORC will consider approving TMB’s full HHR
19 Application.

20 23.

21 In April and May 2021, Konami and Ainsworth submitted their totalizator applications to
22 the ORC. PariMAX and Castle Hill’s applications followed in early October, over two months
23 ago. Each application included a GLI report certifying that the vendors’ HHR games allocated
24 wagers into pari-mutuel pools and that the outcome of each wager was predicated on the results
25 of historical horse races. On October 4, 2021, TMB Racing submitted the initial and material
26

1 components of its HHR Application, pending the ORC’s decision on the Totalizator
2 Applications.

3 **VIII. The ORC unexpectedly delays voting on the completed Totalizator Applications.**

4 24.

5 On October 14, 2021, the Commission informed TMB Racing by letter that it would not
6 consider TMB’s HHR Application until the Commission’s November 2021 meeting. The
7 Commission’s letter nonetheless acknowledged that both TMB Racing and the HHR vendors had
8 been responsive to the Commission’s requests, and it stated that several Totalizator Applications
9 remained on the agenda for the Commission’s October 21, 2021, meeting. Two days later, the
10 ORC staff member responsible for reviewing totalizator applications recommended that the
11 Commission approve Ainsworth’s application, and upon information and belief, did the same
12 regarding Konami’s. The responsible staff member also recommended approving Castle Hill’s
13 application as soon as the Commission received a few outstanding application documents from
14 third parties.

15 25.

16 At the Commission’s October 21 meeting, the same ORC staff member affirmed that
17 Ainsworth’s and Konami’s applications were complete and in order, while Castle Hill’s had a
18 single background check pending (since completed). But the Commission unexpectedly
19 postponed a vote on all three vendor license applications, including the two wholly complete
20 ones, for another month.

21 26.

22 The Commission informed TMB that it would consider the Totalizator Applications at its
23 November 2021 meeting. Shortly before the meeting, however, the Commission again removed
24 the applications from its agenda.

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27.

The Commission then informed TMB it would consider the Totalizator Applications at its December 2021 meeting. Shortly before its scheduled date, however, the Commission canceled the December meeting.

28.

Upon information and belief, the Commission has never failed to grant a totalizator license application that fulfills all the ORC’s formal regulatory requirements, and it routinely grants such applications within 30 days of their completion.

29.

Allegedly, the Commission has repeatedly delayed any vote on the Totalizator Applications, and consequently on TMB’s HHR Application as well, because it is waiting for the DOJ to issue a legal opinion analyzing the lawfulness of TMB’s HHR wagering plan.

30.

At no point during TMB’s numerous discussions with the ORC over the previous two years did the Commission express any concerns about whether TMB’s HHR plan complied with statutory and regulatory requirements for HHR wagering.

IX. For more than eight weeks the DOJ has been analyzing and drafting an opinion on a handful of legal claims that the tribes have advanced related to HHR wagering.

31.

The DOJ began researching and drafting its legal opinion on HHR wagering by the last week of October 2021 at the latest, and very likely prior to that.

32.

On October 6, 2021, a group of tribes had sent letters to the Governor, Secretary of State, and legislative leaders expressing concern about the expansion of HHR wagering in Oregon. Per their letter, the tribes were concerned “about the trajectory of state-regulated gaming in Oregon.” They also claimed that HHR wagering was not pari-mutuel and that, if implemented, it would

1 reduce tribal gaming and state lottery revenues by a small fraction of their current totals. They
2 thus asked that the state “pause” all new gaming approvals until it could conduct a “thorough
3 study” of HHR.

4 33.

5 On October 27, 2021, counsel for the Cow Creek Band of Umpqua Tribe of Indians (the
6 “Cow Creek Band”) sent a similar letter to the DOJ. The letter stated that Governor Kate Brown
7 had informed the Cow Creek Band on October 22 that she “expects” the ORC to seek the DOJ’s
8 legal advice regarding HHR wagering. It also made three legal claims regarding TMB’s planned
9 HHR terminals: (i) that they do not meet the statutory definition of pari-mutuel wagering; (ii)
10 that they constitute unconstitutional private “lottery” games; and (iii) that installing over 200 of
11 them at the Flying Lark would render the facility an unconstitutional “casino” on non-tribal land.

12 34.

13 In late October 2021, TMB Racing provided the DOJ with a legal memorandum rebutting
14 the tribes’ argument that operating HHR terminals at the Flying Lark would transform it into an
15 unlawful casino. In early November, TMB met with the DOJ to discuss these same issues, and
16 on November 15 TMB provided another legal memorandum, this time refuting the Cow Creek
17 Band’s other contentions regarding the definition of pari-mutuel and the prohibition on private
18 lottery games. TMB did not provide the DOJ with an analysis of policy issues relating to the
19 “trajectory” of gaming in Oregon and the effect that HHR wagering would have on tribal gaming
20 and state lottery revenue because those policy issues are not within the DOJ’s mandate to issue
21 an opinion on a “question of law,” *see* ORS 180.060(2).

22 35.

23 Since then, the DOJ has repeatedly deferred its anticipated timing for issuing the legal
24 opinion. As of today, over eight weeks after it began, the DOJ has yet to issue the opinion and
25 has given no indication of its timeline for doing so.

26 ///

1 **CLAIM FOR RELIEF**

2 **(Agency Action Unreasonably Delayed – ORS 183.490)**

3 36.

4 Petitioner repeats and realleges each of the foregoing paragraphs as if fully set forth here.

5 37.

6 TMB Racing is aggrieved by the ORC's continued delay in rendering a decision on the
7 HHR applications because without HHR both GPD and the Flying Lark would operate at a loss.

8 38.

9 The ORC's delay harms TMB because the Flying Lark may not by law offer HHR
10 wagering until both sets of applications are approved, and neither the Flying Lark nor GPD can
11 survive without HHR revenue. TMB's inability to offer HHR wagering will thus thwart two of
12 its key corporate missions, which are to support and revitalize the state-wide horse racing
13 industry and to further economic development in southern and rural Oregon.

14 39.

15 Not only will TMB Racing lose revenue estimated in the hundreds of thousands of dollars
16 for every week the Flying Lark cannot offer HHR wagering, but without HHR, the Flying Lark's
17 remaining operations will not be capable of returning a profit at all. TMB Racing will be forced
18 to shut down the Flying Lark. It will have to let go the 132 personnel it has already brought on
19 board, and abandon its plans to hire over 100 additional employees required for full operation.

20 40.

21 Additionally, this lack of anticipated HHR revenue from the Flying Lark will jeopardize
22 the entire GPD project. Grants Pass Downs currently operates at a loss. Without a path to
23 financial viability, TMB Racing will likely not be able to fulfill its lease payment obligations to
24 Josephine County. It may be forced to shut down GPD entirely, ending the employment of its
25 twenty-four staff members. Importantly, the state's key equine industry organizations, such as
26 the ORC itself and the Oregon Thoroughbred Owners and Breeders Association will receive

1 none of the HHR revenue distributions that SB 165 allocated. With no remaining commercial
2 race track in the state, Oregon’s horse racing industry will likely not survive.

3 41.

4 Moreover, the uncertainty surrounding the ORC’s timeline for rendering a decision on
5 the HHR applications hamstrings TMB Racing’s ability to formulate sound business plans
6 regarding the issues outlined above.

7 42.

8 The Commission has delayed issuing its decision on the Ainsworth, Konami, and Castle
9 Hill Totalizator Applications for at least nine weeks, and, upon information and belief, on the
10 PariMAX application for several weeks after it was recommended for approval as well. As a
11 consequence, the Commission has also delayed for over ten weeks setting a firm date to issue its
12 decision on TMB Racing’s HHR Application.

13 43.

14 Given the nature and circumstances of these administrative decisions, the ORC’s delay in
15 rendering these decisions is unreasonable under ORS 183.490.

16 44.

17 The only two *legal* questions the tribes have raised that are relevant to the Totalizator
18 Applications are whether the HHR terminals meet the statutory definition of “mutuel” and
19 whether they constitute unconstitutional private “lottery” games. It is unreasonable for the ORC
20 to continue deferring its decision on the Totalizator Applications on grounds that it must first
21 receive the DOJ’s opinion on these two very narrow questions that have been within the ORC’s
22 regulatory mandate since 2014. The ORC is under no legal obligation to wait until it receives the
23 DOJ’s opinion before forming its own. Moreover, it is not clear why the DOJ has not yet issued
24 its opinion. But, whatever the cause, the DOJ’s delay cannot reasonably be due to its attorneys’
25 good-faith need for more than eight weeks to analyze just two legal issues on which they also
26 received briefing from opposing sets of interested parties. The ORC, therefore, may not

1 reasonably justify its own delay by claiming that it is waiting for the DOJ to finish considering
2 what can only be non-legal questions outside the scope of its mandate or additional legal
3 questions not directly material to the Totalizator Applications.

4 45.

5 The ORC's current delay is all the more unreasonable in light of the circumstances
6 surrounding these specific applications. The Legislature authorized HHR wagering in 2013 and
7 reaffirmed it just this year in order to provide much-needed financial support to Oregon's horse
8 racing industry. TMB Racing has invested over \$50 million in Grants Pass Downs and the
9 Flying Lark in order to revitalize the equine industry and economic development in southern and
10 rural Oregon. The Flying Lark's HHR wagering floor is integral to its own financial viability as
11 well as that of horse racing at GPD. The continued and future employment of hundreds of their
12 employees is thus at stake. And the harm this delay causes extends far beyond TMB to its local
13 and regional suppliers and their employees as well as to thousands whose livelihoods depend on
14 live horse racing. It is unreasonable for the ORC to keep these businesses and their employees in
15 limbo when the legal and regulatory questions surrounding the Totalizator Applications and
16 TMB's HHR Application cannot reasonably require more than one to two months to analyze and
17 resolve.

18 46.

19 If this Court orders the Commission to decide the Totalizator Applications forthwith, it
20 would also be unreasonable for the ORC to further delay setting a firm date by which it will
21 approve or deny TMB's full HHR Application. Additionally, any decision date beyond February
22 17, 2022, would be unreasonable as well.

23 ///

24 ///

25 ///

26 ///

1 **PRAYER FOR RELIEF**

2 47.

3 WHEREFORE, Petitioner prays for judgment as follows:

- 4 1. An order directing the Commission immediately to issue a decision regarding the
5 Totalizator Applications.
- 6 2. An order directing the Commission to schedule a meeting to vote on TMB Racing's
7 HHR Application by no later than February 17, 2022.
- 8 3. Any such other and further relief that the Court deems just and proper.

9
10 Dated this 28th day of December, 2021.

11
12 HOLLAND & KNIGHT LLP

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